

opposition to ITAA's petition for reconsideration (filed March 6, 1995), and incorporate that opposition by reference herein. The Common Carrier Bureau in the Interim Waiver and the FCC in the NPRM observed that California III returned the regulation of BOC enhanced services to a Computer III service-specific CEI regime of nonstructural safeguards. The Commission stated that its "cost-benefit calculus must include" the transition costs, as well as service disruption and customer confusion, associated with reimposing structural separation.<sup>81</sup> It is MCI that is in "deep denial."

The NPRM placed a key burden of persuasion upon proponents of a return to structural separation:

To the extent that parties propose a reimposition of structural separation, we ask that they identify the benefits that they believe will accrue for the provision of enhanced services to consumers from such action, and articulate why those benefits cannot be achieved under a regime of nonstructural safeguards.... To the extent that parties believe structural separation is appropriate, we ask them to describe particular scenarios and timetables under which BOCs would be required to move from the existing partially integrated CEI plan regime, and to identify the specific costs and benefits of those scenarios.<sup>82</sup>

MCI and the other advocates of structural separation have utterly failed to discharge this burden. They argue that only structural separation can effectively preclude BOC

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<sup>81</sup> NPRM at ¶ 40.

<sup>82</sup> *Id.* at ¶¶ 39-40.

anticompetitive conduct.<sup>83</sup> This argument is wrong as shown earlier, and as previously found by the Commission and courts.<sup>84</sup>

ITAA argues that the costs of structural separation are largely one-time and that the day-to-day costs are essentially nonexistent unless BOCs have idle capacity.<sup>85</sup> ITAA's argument is simplistic and erroneous. ITAA ignores the BOCs' embedded enhanced services such as VMS which enjoy efficiencies of integrated provision, e.g. from shared marketing personnel and support systems. NYNEX and other BOCs submitted compelling evidence of not only substantial one-time costs, but also of significant increases in the ongoing costs of providing enhanced services under structural separation.<sup>86</sup> Furthermore, ITAA does not take account of other significant costs, e.g. from delays in or nonprovision of BOC enhanced services, and from customer confusion resulting from structural separation.<sup>87</sup> ITAA also fails to consider the fact that BOC integrated enhanced services absorb an allocation of common and overhead costs not caused by those services, which helps keep down rates for basic telephone service.

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<sup>83</sup> See Ad Hoc, Compuserve, Hatfield, IIA, ITAA, MCI. Ad Hoc (at n. 46) cites the MECO audit for the proposition that structural separation increases the likelihood of detecting cross-subsidization. Contrary to Ad Hoc's position, MECO was not a fully separate subsidiary in the Computer II sense, but was integrated with the NYNEX Telephone Companies. Furthermore, as indicated earlier, MECO was not an ESP and no cross-subsidization was determined by the FCC in that matter.

<sup>84</sup> Notably, the U.S. Department of Justice has previously stated to the Commission: "The Department disagrees...that the Computer III rules are inadequate to protect against anticompetitive conduct in connection with LEC provision of information services...." CC Docket No. 87-266, DOJ Reply Comments, filed March 13, 1992, pp. 19-20. Compuserve (at pp. 21-22) goes so far as to cite statements supporting structural separation by Judge Greene in 1984, and by the Commission in the pre-Computer III era. The authorities cited by Compuserve are clearly obsolete.

<sup>85</sup> ITAA 57-58.

<sup>86</sup> See, e.g., Hausman Report and Neil Affidavit appended to NYNEX Comments.

<sup>87</sup> The NYDPS observes that (p. 2): "requiring separate subsidiaries may result in customer confusion or inconvenience associated with the loss of branding and one-stop shopping, a reduction of potential synergistic economic savings, and the creation of additional costs that are ultimately borne by the consumer."

Several commentators state that BOCs have placed certain enhanced services in separate subsidiaries and have supported proposed legislation which would include a structural separation requirement applying to certain BOC information services. On this basis, these parties make the quantum and unjustified leap that structural separation is warranted for all BOC enhanced services.<sup>88</sup> It cannot be assumed that all BOC enhanced service operations could be effectively and efficiently incorporated in a fully separate subsidiary. There are many factors -- including whether services are complementary or use similar resources, and market considerations -- which must be considered by a business to determine how best to organizationally structure enhanced service operations.<sup>89</sup> Like any business, the BOCs should be left to decide the most efficient arrangement.

#### **D. Service-Specific Structural Relief**

Only a handful of commentators have suggested that the Commission implement some sort of service-by-service structural relief process, or apply structural separation to a particular class of enhanced services. Such proposals include continued BOC CEI plans,<sup>90</sup> structural separation requirements for electronic publishing<sup>91</sup> and video

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<sup>88</sup> See Ad Hoc, Compuserve, IIA, Prodigy. The placement of operations such as yellow pages and directory publishing in a "separate subsidiary," as noted by NAA (at p. 7 n. 14), does not mean that such a subsidiary follows the Computer II framework. In fact, NYNEX Information Resources Company, which is NYNEX's directory publishing arm, operates from a regulatory perspective under Computer III.

<sup>89</sup> See US WEST 14. The establishment of a separate subsidiary for cellular service or for interexchange service (as may be required for the BOCs to obtain other regulatory freedoms) does not alter the cost-benefit analysis to any meaningful extent for placing BOC enhanced services in a separate subsidiary. For example, the benefits of one-stop shopping for BOC telephone and enhanced services, and customer confusion from reimposing structural separation on presently integrated enhanced services, must still be considered.

<sup>90</sup> Commercial Internet Exchange Ass'n 7.

<sup>91</sup> NAA 8.

programming,<sup>92</sup> and service-by-service analyses of efficiencies from structural integration.<sup>93</sup> The relatively few commentors on this issue reflects that the industry recognizes that a service-specific approval process would be unduly burdensome and unworkable given the convergence of technologies and services.<sup>94</sup> Even Ad Hoc has noted that (pp. 21-22): "It would be futile for the Commission to establish different regulatory regimes for different types of enhanced services." The commentors supporting a service-specific approach essentially seek selective regulatory approaches which would protect their particular "industry" or "market" from BOC competition but ultimately harm the consumer.<sup>95</sup> As the opposing parties' comments make clear, the nine years of regulatory proceedings associated with ONA illustrate the burdensome nature of service-specific structural relief proceedings.

#### IV. CONCLUSION

Nearly thirty years of Computer Inquiries is enough. The Commission should affirm once and for all that its ONA regime of nonstructural safeguards works well to preclude potential BOC access discrimination or cross-subsidy of enhanced services. The Commission's procompetitive policies underlying that regime have yielded substantial public interest benefits, including an array of BOC enhanced services effectively and efficiently delivered on an integrated basis, expanded consumer choice, and a flourishing

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<sup>92</sup> CCTA 17, NCTA 7.

<sup>93</sup> Ad Hoc 22.

<sup>94</sup> For example, a new videotext information service is now possible whereby slow motion video can be downloaded onto a personal computer from the Internet. Also, VMS equipment is being used to provide content-based services, such as providing sports results and stock quotes in voice and facsimile format. See NYNEX CEI Plan (March 12, 1995); BellSouth CEI Plan (March 12, 1995); Pacific Tel. CEI Plan (March 12, 1995).

<sup>95</sup> E.g., Commercial Internet Exchange Ass'n, NAA, NCTA.

and competitive enhanced services marketplace. Thus, the Commission is fully justified in granting total structural relief for BOC enhanced services. The record confirms that the Commission should not take a giant step backwards by reimposing structural separation.

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Dated: May 19, 1995  
95-20rep.doc

**CERTIFICATE OF SERVICE**

I certify that copies of the foregoing **NYNEX REPLY COMMENTS** were served on each of the parties listed on the attached Service List, this 19th day of May, 1995, by first class United States mail, postage prepaid.

  
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